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DATE: August 16, 1989

TO: The Board of Zoning Appeals

FROM: City Attorney

SUBJECT: Criteria for Issuance and Denial of Variances
and Conditional Use Permits Including Findings
of Fact

BACKGROUND

The primary functions of the Board of Zoning Appeals ("BZA") are to "hear and determine appeals from the rulings, decisions and determinations of the Zoning Administrator, granting or denying applications for conditional use permits, or for other permits, or for variances from the zoning provisions of the Municipal Code or zoning ordinances." Municipal Code section 101.0501(E). The purpose of this memorandum is to provide an update on the law and criteria the BZA must use in making its determinations.

FINDINGS

Decisions made by the BZA regarding variances and conditional use permits must be supported by findings of fact. The findings of fact explain the basis of its decision in light of the requirements for the permit. Municipal Code sections 101.0502(C) and 101.0503(C).

California case law gives several reasons as to why such factual findings are necessary:

1. Findings enable the parties involved to determine whether they should appeal and on what basis. *Respers v. University of California Retirement System*, 171 Cal.App.3d 864, 870 (1985); *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 514 (1974).
2. Findings inform the body to whom the appeal is made of the basis of the BZA's decision in order to properly review the decision. *Respers*, supra at 870; *Topanga*, supra at 514.
3. Findings demonstrate how the BZA bridged the analytical gap between the raw evidence and the ultimate decision. *Topanga*, supra at 574.

Therefore, in order for a decision of the BZA to be valid, the BZA must clearly state its factual findings as a failure to do so could result in a reversal on appeal. It is permissible to incorporate findings made by others, such as the Zoning Administrator, but that incorporation must be made clearly on the

record. *Respers*, supra at 872. It is also essential that the BZA demonstrate the analytical process used when reaching a conclusion from the evidence presented.

VARIANCES

A. Findings

Municipal Code section 101.0502 lays out the specific requirements which must be met in order to grant a variance. They shall be spelled out in detail below. It should be noted that each of the requirements must be met before the BZA may grant a variance. *Topanga*, supra at 518.

1. There are special circumstances or conditions applying to the land or buildings for which the adjustment is sought, which circumstances or conditions are peculiar to such land or buildings and do not apply generally to the land or buildings in the neighborhood. Such conditions shall not have resulted from any act of the applicant subsequent to the adoption of the applicable zoning ordinance. ¶Emphasis added.σ

Special circumstances must apply to the land or buildings of the property in question and may include such features as property size, shape, topography, location or surroundings. *Miller v. Board of Supervisors*, 122 Cal.App.3d 539 546 (1981). In determining the uniqueness of the property in question, the BZA should use comparative information from surrounding property. *Topanga*, supra at 516-517.

It is important to note what special circumstances or conditions are not. Mere hardship is not enough; the special circumstances must result in unnecessary hardship to the complainant. *Broadway, Laguna Assn. v. Board of Permit Appeals*, 66 Cal.2d 767, 777-778 (1967); loss of potential profit is not a special circumstance, and a variance should not be granted on that basis alone. *Broadway*, supra at 774-775; financial loss, standing alone, is not a special circumstance, though it may be considered along with other factors. *Zakessian v. City of Sausalito*, 28 Cal.App.3d 794, 802 (1972); self-induced hardship such as where an applicant builds without a building permit and then seeks a variance, is not a special circumstance. *Minney v. City of Azusa*, 164 Cal.App.2d 12, 31 (1958).

2. The aforesaid circumstances or conditions are such that the strict application of the provisions of the ordinance would deprive the applicant of the reasonable use of the land or

buildings and that the variance granted by the City is the minimum variance that will accomplish this purpose.

While not specifically defined in case law, reasonable use can be interpreted to mean a use which allows a reasonable return on one's investment. See *Broadway*, supra.

3. The granting of the variance will be in harmony with the general purpose and intent of the zoning regulations and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

In order to make the above finding, it is necessary for the BZA to make a determination of the purpose of the regulation from which the variance is sought. *Zakessian*, supra, at 801. Once the BZA has determined the purposes of the particular regulation, then it must determine if the applicant's proposed deviation is in harmony with that purpose. For example, the BZA may determine that the purpose of minimum side-yard requirements is to provide for light, air and view. It would then ascertain whether the applicant's request was consistent or "in harmony" with that purpose.

4. The granting of the variance will not adversely affect the Progress Guide and General Plan for The City of San Diego or the adopted community plan for the area.

A variance cannot be used to change the zoning regulations governing a particular piece of property.

In addition to the four required findings, the BZA should take the following into account. Due to the special circumstances or conditions, a variance attaches itself to the particular piece of property for which it is granted. It is immaterial that similar variances have been granted (even in the same neighborhood). *Minney*, supra, at 24.

B. Conditions

Municipal Code section 101.0502C.6. allows the Zoning Administrator (and subsequently the BZA) to "impose conditions as deemed necessary and desirable to protect the public health and general welfare."

The conditions imposed on the granting of a variance are to "preserve the general purposes and intent of the zoning ordinance." *Cow Hollow Improvement Club v. Board of Permit Appeals*, 245 Cal.App.2d 160, 182 (1966).

C. Amendments

The BZA may also amend a variance. See Municipal Code

section 101.0502E. There must be a public hearing and the decision to grant the amendment must be evaluated as to the four requirements outlined above.

CONDITIONAL USE PERMITS

Municipal Code section 101.0510 states the purpose of a conditional use permit ("CUP") as follows:

Certain classes of land use are not permitted by right in some or all zones of the City, but are nevertheless recognized as being desirable to the full function of the City under appropriate circumstances. It is the purpose of the Conditional Use Permit regulations to provide a means whereby proposals for such land uses may be examined on a case by case basis to determine whether, and under what conditions, these uses may be approved at a given site.

In exchange for the development and land use privileges extended under a CUP, the permittee shall agree to abide by all conditions which the City may require. Generally, the privileges

granted by a CUP "run with the land" and are binding on not just the permittee, but subsequent successors in interest of the land.

B. Findings

Municipal Code section 101.0510G.2. states the necessary requirements which must be made in order to grant a CUP. They are:

a. The proposed use will not adversely affect the neighborhood, the General Plan, or the Community Plan, and if conducted in conformity with the conditions provided by the permit, will not be detrimental to the health, safety and general welfare of persons residing or working in the area; and

b. The proposed use will comply with all relevant regulations in this Code.

Note again that the decision to grant or deny the CUP must include findings of fact stating how the CUP fulfills (or fails to fulfill) the above requirements. See Municipal Code section 101.0510G.4.

C. Conditions

Municipal Code section 101.0510G.5. provides:

In granting a conditional use permit, the decisionmaker may impose such conditions as it deems necessary and desirable to protect the public health, safety and general welfare.

In addition to the above, specific CUPs (such as an alcohol CUP) may make provisions as to specialized findings and conditions that can be made.

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